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PART I

Standardization and the State

PROOF

PROOF

International Trade Law and Technical Standardization

Panagiotis Delimatsis¹

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Increased international standardization by the private sector results from an ever-increasing demand of consumers for better and safer products, technological advances, the expansion of global trade and the ever-increasing focus on social and sustainability issues.² International standards affect our everyday life in multiple ways. Standards bring about and solidify technological evolution, innovation and diffusion of knowledge. In that respect, they have an important impact on consumer wellbeing. They play a decisive role as to whether the business and market environment will be conducive to increased innovation and trade. They form an important condition for doing business and affect access to markets, determining the profitability, growth and ultimately the survival of entrepreneurs and economic operators alike. Hence, standards have a crucial *trade facilitation function*.

¹ This chapter builds heavily on a previous version that appeared in Delimatsis (2015). Several colleagues have influenced my thinking on standardization-related issues, including Alessandra Arcuri, Axel Marx, Petros Mavroidis, Jens Prüfer, Charles Sabel, Harm Schepel, Florian Schütt and Jan Wouters. For its research on competition, standardization and innovation, TILEC has received funding from Qualcomm Inc., which is gratefully acknowledged. The research on which this article is based was conducted in accordance with the rules set out in the Royal Dutch Academy of Sciences (KNAW) Declaration of Scientific Independence. Any remaining errors or misconceptions are the author's alone.

² Egan 2001.

Yet, standards can also be adopted with a view to restricting access to a given market, thereby neutralizing any trade concessions made in other fora, including the World Trade Organization (WTO) or preferential trade agreements (PTAs). When standards are very diverse and are applied in a thoughtless manner, trade is negatively affected and economies of scale become more difficult to attain. For small entrepreneurs in particular, the costs of compliance with this heterogeneous set of standards may be prohibitive, *de facto* precluding any possibility for gaining access to foreign markets.³

As standards can potentially constitute impactful ‘behind-the-border’ (so-called non-tariff) technical barriers that nullify trade concessions and distort the expectations of traders, the WTO takes a clear stance in favour of the creation of and adherence to international standards. Already the preamble of the WTO Agreement on Technical Barriers to Trade (TBT) commences with an orthodox assumption, that is, that international standards improve efficiency of production and facilitate the conduct of international trade.⁴

However, the WTO has no capacity or expertise that would allow it to set technical standards. In addition, the Committee on Technical Barriers to Trade (hereinafter, the TBT Committee) does not develop nor adopt standards itself. Rather, as exemplified already by its preamble, the TBT exerts a high level of deference towards technical rationality as expressed through international standard-setting activities *outside* the WTO. Indeed, standards developed within international standard-setting organizations (SSOs) acquire a prominent role within the WTO through the very text of the TBT. The latter not only requires that WTO Members use ‘relevant international standards’ but also presumes compliance with the TBT when such standards are used as a basis for domestic technical regulations.

Is this regulatory outsourcing justified? The answer is not so trivial, in particular when one considers the consequences of such outsourcing. Arguably, it essentially suggests that certain non-WTO rules still are WTO-compatible as long as they are relevant to the product at issue in a WTO dispute; and this regardless of the process that led to their adoption (which process, by the way, is totally out of the control of the WTO). Quite astonishingly, the TBT entails such delegation of regulatory power⁵ without any inquiry as to the actual processes used throughout the development of international technical standards. This is even more surprising if one considers that such delegation of international standard-setting activities relates to private actors active in the creation of standards.

This constellation brings to the forefront the importance of procedural guarantees within international SSOs, notably with regard to representation of varying interests and opportunities for participation offered to all WTO Members. However, our knowledge about the mechanics of international standard-setting is relatively limited at best and a black box in certain cases.

The vantage point of this chapter is that such deferential approach adopted by the WTO is untenable. Attributing to international standards developed elsewhere automatic legal force in the WTO may clash with contemporary demands for more transparency and due process within global governance institutions, more generally, and openness in international standard-setting, in particular.⁶ It can also give the wrong signals to international SSOs which have become the global standard-setters in certain categories of products and services. The key argument of the chapter is that the WTO can play an instrumental role in improving standard-setting processes

³ Messerlin 2001.

⁴ Swann et al. 1996, 1297–1313.

⁵ For a similar observation under the SPS, see Bütte (2008, 219).

⁶ Cf. Von Bogdandy 2012, 315.

within international SSOs, because its very foundational treaty (and the TBT in particular through the presumption of WTO compatibility we mentioned earlier) makes it a prominent promoter of such standards and indeed a high-level diffusion mechanism. The chapter argues that, due to its powerful dispute resolution system, the WTO can become a potential drive for change in transnational standard-setting. Section B describes the nature of international standards, tilting between public and private, in a grey area of law, whereas Section C analyses the position of international standards and the bodies that create them from a positive and normative viewpoint. Section D concludes.

A. DECIPHERING THE NATURE OF INTERNATIONAL STANDARDIZATION

1. *Informal, Voluntary and Yet Influential as ever*

Standard-setting resembles law-making, as standards, like laws, are the outcome of discussion, bargaining, deliberation and compromise among non-state actors.⁷ However, standards established by international SSOs such as the ISO are not law per se, but rather serve a clear regulatory function prescribing rules for others to follow.⁸ An important distinction, again, is that, whereas domestic standardization can encompass both binding and voluntary technical specifications and standards, international standardization, as noted previously, typically involves standards with which compliance is voluntary. Once international standards are adopted, it is a country's prerogative to adopt these standards in the form of domestic technical regulations (compliance with which is mandatory), or as standards (compliance with which is optional). Depending on the domestic constitutional structures, such standards may be adopted through the relevant national standard-setting bodies or public regulatory agencies. A third option for a country is to maintain or adopt its own standards or allow for some leeway to domestic companies to decide as to whether they would like to comply voluntarily with the international standards at stake.⁹

Standards, no matter how well-crafted, can interfere with market access. This is mainly because standards reflect domestic preferences and values, which may diverge, thereby inflating compliance costs and values for companies.¹⁰ It is then compliance costs which corroborate the case for the development of international standards. Indeed, if developed internationally, then substantial gains can be made through the diminution of such costs and by addressing network externalities and information asymmetries. Thus, taking into account pure efficiency considerations, the locus of standardization is to be found outside national borders.¹¹

With the emergence of global supply chains, the importance of international standards increases, suggesting that compatibility standards of high quality can yield substantial network effects that can make such standards self-enforcing.¹² However, the reduction of compliance costs may be only a long-term effect, as, in the short run, the effect of international standards may vary in that compliance costs will rise for some firms, as the new standard used may be more sophisticated. At the same time, an international standard, the theory suggests, would lead to the diminution of consumer costs due to better information and the possibility to compare prices.¹³

⁷ Cf. Kingsbury et al. 2005, 15.

⁸ See also Black 2009, 246.

⁹ See Nakagawa 2011, 109.

¹⁰ Staiger & Sykes 2011, 149.

¹¹ Bütthe & Matli 2003, 1.

¹² WEF 2012.

¹³ See WTO 2012c, 136.

Standards constitute a form of codified technical knowledge that enables the development of products and processes. Standards regularize and constrain behaviour (regulative function); lend a taken-for-granted quality to certain technologies and *modi operandi* (cognitive function); and favour cooperative strategies over adversarial ones (normative function).¹⁴ In the absence of standards, technological progress would lack an important instrument for benchmarking and capitalizing on advances in the field of technology. In addition, first-mover advantages in standardization are substantial incentives for firms to innovate.¹⁵ In that sense, standards are essential enabling components of any functioning market and a decisive instrument for economic growth.¹⁶ For instance, studies in France, Germany or the UK have shown that the impact of standards on growth can range between 0.3 and 0.9 of national GDP.¹⁷

Contextually, international standardization is part of the undisputed rise in transnational law-making, as SSOs become more private actor-driven. Such transnational regimes have often evolved in a vacuum, avoiding any frontal confrontation with State law. In the case of standard-setting at the international level, whereas there are private-driven SSOs, in practice state-driven actors such as regulators or government-sponsored bodies may develop partnerships – be it formal or informal – with private actors to generate what can be termed ‘informal law’. It is not only the informal character of the actors, but informality extends to the output of SSOs as well: Whereas domestic standardization can encompass both binding and voluntary technical standards and specifications, international standardization typically involves standards with which compliance is *voluntary*.

2. Certain Traits of SSOs

As there are manifold technological approaches, an SSO offers a forum where competitors and competing vested interests can learn from each other as to the best available technologies but also resolve conflicts and coordination problems. In practice, SSOs serve as an important information- and knowledge-sharing forum with mutual learning occurring among participants; crucial laboratories for the preparation of standards based on a chosen or dominant technology and certification checkpoints of those standards at the post-development stage; and, finally, as instrumental regulators on the use of those standards, for instance, when it comes to the licensing of the standardized technology.¹⁸

Generally, international SSOs choose consensus as the decision-making mode *par excellence*, which the ISO defines as ‘general agreement, characterized by the absence of *sustained opposition* to *substantial issues* by *any important part of the concerned interests* and by a process that involves seeking to take into account the views of all parties concerned and to reconcile any conflicting arguments’ (emphasis added). However, it is made clear that consensus need not imply unanimity.¹⁹ In other SSOs of private nature, a stricter view with respect to the meaning of consensus may be adopted also to increase the legitimacy of processes.

¹⁴ Lane 1997, 197.

¹⁵ Again, and more generally, if we consider standardization as infrastructure, it can promote but also hamper innovation. See also Acemoglu et al. 2012, 570.

¹⁶ Blind & Jungmittag 2008, 51.

¹⁷ See European Commission 2016a, 4.

¹⁸ See Lerner & Tirole 2015, 547–548.

¹⁹ See ISO/IEC Dir 1, clause 2.5.6. This definition is generally accepted as reflecting the understanding of what consensus entails in standard-setting bodies. See also EU Regulation 1025/2012, Annex II, para. 3(b).

Although unanimity is not often required, most international organizations aim at consensus building and have those mechanisms in place in their constitutions and secondary law. Consensus however can cause delays, whereby competitors argue for their preferred solution or simply hold out until one side concedes or withdraws to the benefit of the other.²⁰ Endorsement of a given standard at the end of the process can generate substantial rents which make the effort quite worthwhile,²¹ but also confirms the value of (and, in the end, legitimizes) the standard-setter as a stabilizing factor in its capacity as a coordinating authority.

In addition, it was shown that, in areas of rapid technological change and innovation and thus important rents being at stake (distributional conflicts), the standard-setting process may be slower in a consensus-based standard-setting body, but delays will be efficient when the underlying technology improves with the time. Thus, and quite importantly, at the end of the lengthy process higher quality outcomes will be produced.²² This means that, contrary to conventional belief, and somehow counter-intuitively, striving for consensus may have a very limited impact on the technical and scientific excellence of a given standard. However, when vested interests are strong, relaxing the way consensus is required or identifying a neutral participant to break deadlock (i.e. binding arbitration) may be preferable to increase the effectiveness of a given standard.²³

Due to the importance of standardization for businesses, substantial financial resources are invested in standardization fora.²⁴ Indeed, an active participation in standardization activities is necessary to boost innovation, notably in case of highly competitive markets, but is also quite expensive. The increase of standards-related patent disputes, the emergence of industry-sponsored consortia, but also actions against allegedly anticompetitive practices within SSOs is indicative of the importance of standardization and the stakes at play, notably in high-tech areas.²⁵

In practice, not only competition among *firms* to innovate and standardize but also competition among *standard-setting groups* to attract such firms constitutes a typical feature of private standard-setting. Standard-setting groups compete on offering the most attractive institutional setting for the development and update of standards. What will many times determine the choice of forum (i.e. standard-setting body) is whether for a given firm the possibility to dictate a standard carries more weight in its standards-related behaviour than the reputation of a given standard-setting body, that is, whether reputation costs are lower than the benefits of dictating the standard in a second-best standard-setting scheme. This choice will essentially depend on the size of the market and the attractiveness of the technology.²⁶ The role of possibilities within a given SSO for addressing and resolving disagreements and potential conflicts, for instance, flexible rules relating to participation or expedited mechanisms for solving disputes, may be equally crucial for the survival and continuous relevance of a particular SSO.²⁷

²⁰ Farrell and Saloner first described this tactic as a 'war of attrition', suggesting that it may lead to the technically best solution, but with a significant delay. See Farrell & Saloner 1988, 235.

²¹ Rysman & Simcoe 2008, 1920.

²² Simcoe 2012, 305.

²³ See Farrell & Simcoe 2012.

²⁴ See *id.* at 236–38; see also the observation of the Advocate-General Campos Sanchez-Bordona in the recent *Elliott* case before the CJEU that '[i]ndustry assumes the greater share of the costs of standardization'. *James Elliot Construction Ltd.* (CJEU 2016, ¶ 58).

²⁵ See Vol. 1; see also Larouche & Van Overwalle 2015.

²⁶ Chiao et al. 2007.

²⁷ Delimatsis & Kanevskaia 2018.

As noted earlier, the stakes are quite high in standard-setting procedures and thus participants are self-interested agents who aim to extract the maximum rents. In this process, rents can be extracted, for example, when a particular technology is considered standard-essential or when a given legislation adopted by public bodies refers to a standard created within an SSO as a benchmark for compliance with law. One can easily identify a certain pattern in standardization activities and the incentives to participate therein. Even though standards are adopted mainly through soft-law processes by non-state actors, these actors aspire to capitalize on their success and see the initially non-binding norms they champion transformed into hard law to gain rents from first mover advantages through expedited enforcement.

This constellation and *modus operandi* does not necessarily imply that inferior technologies will prevail thanks to strategic behaviour. On the contrary, more often than not, strategic behaviour and market power will still not bear fruit unless it is backed up by important technological strength. This result is typically due to the dynamic process that characterizes standardization and substantial investments on research and development (R&D). The standardization-related procedures may also often have the necessary safeguards or remedies in place to avoid blatant negligence against the best available technology.²⁸ This would suggest that procedures within SSOs should be continuously reviewed to ensure that distortions of this type are duly addressed and avoided. Thus, standard-setting bodies are important coordination devices.

The stakeholders involved in international standardization are of hybrid nature and, like self-regulators, have a conflict of interest inherent in their functions: they are there to serve the interests of their constituents but also the national interest.²⁹ In many cases, domestic industries are so deeply convinced of the superiority of their standards that they believe they promote the public interest – along with their own – when they strive for the application of standards which actually reflect characteristics of their own standards. At this level, industry representatives and SSBs participating in the international standard-setting process become the missionaries who convey a strikingly paradoxical message of globalization: as we move towards closer integration and interdependence at a global level,³⁰ societies may prove to be less prepared to abandon long-established practices and important values that have shaped their lives for decades or even centuries. The result is that when they discuss and negotiate in a globalized context, they tend to defend fiercely or to attempt to impose their domestic preferences and values.

This probably explains why creating globalized standards or achieving harmonization of technical regulations is a utopian ideal in the short run.³¹ Thus, the formula ‘1+1+1’, that is, ‘one standard, one test and one conformity assessment procedure accepted everywhere’ is not realistic. Without the necessary procedural guarantees in place, the beneficial effects of standardization can be undermined if standardization cannot resist market power nor has the institutional sensitivity and accommodating structures to take into account the views of smaller market players or important societal values.³² Thus, several international SSOs have taken steps to ensure effective participation, including the ability to attend meetings through electronic means; the disclosure of all minutes of the meetings; the possibility for partnerships with more advanced participants and the like.

²⁸ For certain problematic features of the remedies system within the ISO, see Delimatsis (2018).

²⁹ See, e.g., US Trade Agreements Act of 1979 (providing that the representation of US interests before any private international standards organization shall be carried out by the organization member, defined as ‘the private person who holds membership in a private international standards organization’). See also Schepel 2011, 404.

³⁰ Lazer 2001.

³¹ Sykes 1999.

³² Abbott & Snidal 2001; see also European Commission 2011a, 11ff.

B. THE TREATMENT OF INTERNATIONAL STANDARDS UNDER THE TBT AGREEMENT

The impressive reduction of tariffs since the inception of the General Agreement on Tariffs and Trade (GATT) in the late 1940s and the outright prohibition of the use of quantitative restrictions that the GATT requires has led to the use by WTO Members of ‘behind-the-border’, domestic instruments to protect their industries.³³ These non-tariff barriers (NTBs) have ultimately emerged as persistent trade barriers.³⁴ To make things worse from a market access standpoint, rules, specifications, standards and other documents with some normative content created by non-state actors regularly impinge on economic action. Thus, delegation of regulatory power to private actors and the rise of private government and transnational networks are not unproblematic from an international law viewpoint, as these activities may fall outside the scope of traditional inter-state rules.³⁵

The GATT is a negative integration contract. It is essentially based on one obligation which is imposed on the WTO Membership: every domestic policy that impacts on trade has to be applied in a non-discriminatory manner, thereby ensuring equality of opportunities between domestic and foreign products, but also among foreign products only. On the other hand, policies affecting trade are to be unilaterally prescribed at a national level and thus there is no pre-defined set of policies by which all WTO Members must abide. This means, *inter alia*, that the GATT does not imply any compulsory adherence to international standards.

However, with the adoption of the TBT in the mid-90s and the establishment of the WTO, the WTO drafters decided to go beyond non-discrimination to promote regulatory efficiency domestically in areas such as technical or food safety regulations.³⁶ As we will see below, this shift of focus inevitably included voluntary international standards as expressions of international technical consensus developed in international SSOs such as the ISO or the Codex Alimentarius. With this change in the multilateral trading system, the processes used within international SSOs, neglected by many up to that point in time, came to the forefront, leading to ensuing transformations of their *modus operandi*.³⁷

1. *Referencing International Standards in the TBT Preamble*

The TBT substantiates Members’ attempt to effectively deal with NTBs and harness badly designed and badly applied technical regulations, specifications, standards and procedures domestically. However, it also acknowledges Members’ prerogative to autonomously pursue public policy objectives such as those relating to the protection of the environment or consumers, provided that the non-discrimination principle is observed.³⁸ Early on in its preamble, the TBT points to the importance of harmonization of compatibility standards by acknowledging the role of international standards as trade facilitators and technology transfer vectors. In other words, the TBT encourages the development of such harmonized standards at the international

³³ Kono 2006 (showing that democratic regimes have asymmetrical influence over the various types of protection, i.e. while leading to lower tariffs, they lead to higher NTBs).

³⁴ Wilson 2002.

³⁵ See, e.g., Donnelly 2007.

³⁶ See Marceau & Trachtman 2002; Howse & Langille 2012.

³⁷ For instance, Motaal (2004) unequivocally describes the transformation that international SSOs, which prepare, draft and adopt SPS standards, have undergone since 1994 due to the entry into force of the *SPS Agreement* at the conclusion of the Uruguay Round.

³⁸ See also WTO 2015, para. 213.

level. The TBT explicitly refers to international standardization as a highly relevant process for addressing technical barriers to trade, thereby endorsing by reference the importance of the work of several decades done within international SSOs to advance technological progress. The fact that the TBT, contrary to the SPS, does not explicitly refer to particular international SSOs does not alter this observation.

Thus, both the TBT and the SPS make a rather considerate choice in favour of international standards. If one is to strike a reasonable balance between concealed protectionism and the well-meant pursuit of legitimate objectives by a benign government, benchmarks (or proxies) are needed. Under the GATT, the necessity test of the general exceptions provision enshrined in Article XX GATT exerts this role,³⁹ allowing to identify measures that exceed what is necessary to achieve the degree of contribution that a given measure makes to the pursuit of a legitimate objective.⁴⁰ A necessity test as a proxy in the case of the TBT and the SPS would be necessary (and indeed such a test is to be found in both agreements), but it is not sufficient for a treaty that aims at *positive* integration through harmonization. Additional common denominators or heuristic devices are needed. Due to their unambiguous technical expertise, international SSOs and the instruments they create, i.e. international standards, are deemed appropriate for this role.

At the same time, and perhaps contrary to the mainstream literature about TBT,⁴¹ there is no *carte blanche* for international standard-setting processes enshrined in the TBT preamble. Rather the approach is much more critical when one looks carefully at the preamble. Indeed, the TBT preamble, after hailing the importance of harmonizing international standards and conformity assessment systems, refers to Members' desire to ensure that technical regulations and standards do not create unnecessary trade barriers. Arguably, this relates not only to domestic measures but also to international standards. This interpretation is reasonable due to the use of the word 'however' in the fifth recital of the TBT preamble. It is only plausible to suggest here that 'however' refers to what preceded under the third and fourth recitals, which exclusively refer to *international* instruments.

2. The Substantive Scope of TBT: The Distinction Between a Technical Regulation and a Standard

Rationae materiae, the TBT distinguishes between technical regulations and standards. More specifically, it covers mandatory technical regulations and voluntary product standards (such as those relating to size, quality, composition, or labelling) as well as conformity assessment procedures. Despite the reference to ISO/IEC Guide 2:1991, which was subsequently revised within ISO, the TBT offers definitions for the three main categories of measures coming under the TBT ambit in Annex 1 of the agreement. For our purposes, we will focus on the first two categories. Thus, a technical regulation is defined as a:

[d]ocument which lays down product characteristics or their related processes and production methods, *including the applicable administrative provisions*, with which *compliance is mandatory*. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method. (emphasis added)

³⁹ See Delimatsis 2011.

⁴⁰ Cf. WTO 2015, para. 319.

⁴¹ See, e.g., Appleton 2005.

Furthermore, it defines a standard as a:⁴²

[d]ocument *approved by a recognized body*, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which *compliance is not mandatory*. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method. (emphasis added)

The two definitions overlap already in their very wording. More strikingly, the second sentence in both definitions is identical. Importantly, both definitions make clear that they cover labelling requirements and production and process methods (PPMs). After the Appellate Body decision in *EC – Sardines*, the traditional view that allowed drawing the line between the two categories of products was whether non-compliance with a given measure in fact prohibits access to a given market (technical regulation) or whether access to a given market was possible irrespective of compliance with a given specification (standards).⁴³

The Appellate Body examined the constitutive elements of a technical regulation under the TBT in *EC – Asbestos* and *EC – Sardines*, and, more recently, in *EC – Seal Products*. First, it found that a technical regulation may lay down one or more *binding* product characteristics in a *positive* or *negative* form, i.e. it may require that a product possesses (or not) particular characteristics. Thus, the document at stake must have a certain normative content.⁴⁴ According to the Appellate Body, this includes any objectively definable features, qualities, attributes, or other distinguishable mark of a product. Those product characteristics may be intrinsic or they may be related to the product such as the means of identification, the presentation and the appearance of a product.⁴⁵ Additionally, it should be applicable to an identifiable product or group of products. Finally, compliance is mandatory, suggesting that non-compliance would allow an enforcement mechanism to sanction a particular producer.⁴⁶

In *EC – Sardines*, the Appellate Body found that compliance with the relevant EC Regulation was mandatory because the legislative instrument used was binding and directly applicable in all EU Member States. In view of the many similarities among the definition of technical regulation and that of a standard, two appear to be the main differences between the two types of measures: the first is that, whereas the technical regulation is adopted by a governmental body and thus is a State measure, a standard is typically issued by private or semi-private standardizing bodies, that is, bodies with standardization activities. A standard can later become a technical regulation if adopted or used as a basis for a legislative act by the State. The second difference is that, unlike a technical regulation, compliance with a standard is voluntary.

3. TBT Basics Revisited: Blurring the Distinction Between Technical Regulations and Standards

The actual contours of the definition of a technical regulation and its relationship with the definition of a standard under the TBT was more recently discussed in the controversial *US – Tuna II* dispute relating to a dolphin-safe labelling scheme for tuna products.⁴⁷ Under the measure

⁴² For the negotiating history of this definition, see TBT Committee (1995).

⁴³ Cf. Van den Bossche 2008. As discussed below, the Appellate Body decoupled the two in *US – Tuna II*. See WTO 2015, para. 196.

⁴⁴ WTO 2014, para. 5.10.

⁴⁵ WTO 2001, para. 67.

⁴⁶ See WTO 2001, para. 76; WTO 2002a, para. 176.

⁴⁷ See also Mavroidis 2013.

at issue, tuna products sold in the United States could be labelled ‘dolphin-safe’ only if certain requirements were met, in particular with respect to the way tuna was harvested. Crucially, for tuna to be imported, no ‘dolphin-safe’ label was required.

The Panel first and the Appellate Body at the last instance found that the measure at issue was a technical regulation within the meaning of Annex 1.1 TBT. Both considered that whether the measure at issue was imposing conditions on the access to the ‘dolphin-safe’ label rather than the US market as a whole was important and indeed decisive in this respect. A critical element in this case appears to have been that the US measure covered the ‘entire field’ of what ‘dolphin-safe’ meant in relation to tuna products in the United States.⁴⁸ In the Appellate Body’s words:⁴⁹

In effect, the measure at issue establishes a single definition of ‘dolphin-safe’ and treats any statement on a tuna product regarding ‘dolphin-safety’ that does not meet the conditions of the measure as a deceptive practice or act.

After observing that the measure at issue consisted of US federal legislative and regulatory acts and that included administrative provisions, the Appellate Body found that the ‘dolphin-safe’ labelling requirement was a technical regulation for the purposes of the TBT.

Arguably, the analyses of the Panel and the Appellate Body are not convincing⁵⁰ and makes much of Annex 1.2 TBT superfluous by blurring the distinction between mandatory and voluntary compliance. More fundamentally, it deprives Annex 1.2 TBT of its *effet utile*, rendering it redundant. Systemically, it may have significant repercussions for various sustainability-related labelling schemes, organized and applied by both governmental or hybrid and private standardizing bodies. This is particularly so in cases where: (i) no governmental scheme is present in the market and (ii) some connection with the government or administrative guidance can be proven, thereby linking the standardization body with the State. If none of the two happens, then only a very marginal set of rules could come within the definition of a standard under Annex 1.2 TBT, taking into account the similarity of the second sentence of Annex 1.1 and 1.2 TBT.⁵¹

It is submitted that both the Panel and the Appellate Body failed to give meaning to the fact that the US measure was not concerned with setting characteristics for a product to be regarded as tuna. Rather, the measure at issue set the traits of *dolphin-safe* tuna products. Tuna products, no matter how they were harvested, could still enter the US market. Both the Panel and the Appellate Body invoked *EC – Sardines* to corroborate their findings. However, they both seemed to neglect a fundamental difference between the two cases: the EC regulation allowed only one particular species of sardines to be marketed as preserved sardines within the EU. Thus, it was clear that no other sardines could enter the market with the label ‘preserved sardines’. Nevertheless, in *US – Tuna II*, traders were free to access the tuna market without any labels relating to their ‘dolphin safety’. Note, in stark contrast, that in *EC – Sardines*, Peruvian sardines could not enter the EU market. In the facts of *US – Tuna II*, though, tuna products could still be marketed and sold as ordinary tuna even if they do not comply with the ‘dolphin-safe’ labelling requirements.⁵² Thus, the WTO judiciary conflated the requirements for access to the *label*

⁴⁸ See WTO 2015, para. 193.

⁴⁹ *Id.* at para. 195.

⁵⁰ Note that one of the panelists in the panel stage filed a separate opinion on this particular matter. See WTO 2011b, para. 7.146ff.

⁵¹ Taking *US – Tuna II* as an example, if the same dolphin-safe scheme was promulgated by a private standardizing body, then the scheme would have been classified most likely as a standard and not a technical regulation. However, is it only the governmental involvement that determines whether we apply Annex 1.1 or 1.2 TBT? The focus on compliance and exclusion of the market for a given product seems to be safer a criterion.

⁵² See also the EU arguments in WTO 2015, para. 155; and the panelist’s dissenting opinion in WTO 2011b, para. 7.164.

with the requirements for access to the *market*. In *US – Tuna II*, it was at the discretion of the producer to comply or not with the requirements of the label. However, in *EC – Sardines*, that was definitely not the case.

To show the problematic character of this interpretation, one can juxtapose it to the US measure that was at stake in the COOL dispute. In this case, the measure at issue imposed an obligation on retailers selling specific meat products in the US downstream market to label those products depending on their country of origin.⁵³ In this case, such products could not get to the final point of sale without such label. If the *US – Tuna II* interpretation holds, then the COOL measure and the ‘dolphin-safe’ label would be labelling systems producing the same effects. However, they clearly do not, as in the case of country of origin labelling for meat, the meat product would not be allowed to reach consumers unless such label is affixed to the product. This result does not appear to hold a strict scrutiny of consistency. The *EC – Seal Products* Appellate Body Report only comes to corroborate the argument made here. In this case, the Appellate Body underscored that the EU relevant legislation prescribes rules relating to the *placing* on the EU market of seal products in a *binding* fashion.⁵⁴

For the sake of comparison, long-established case law in the EU would suggest that a measure of this type would most likely survive the scrutiny of the Court of Justice of the European Union (CJEU). Indeed, not much can be said against the legality of the labelling scheme at issue when juxtaposed to the *Keck* formula: the US measure applies to all relevant traders operating in the market and affects in the same manner, both in law and in fact, the selling of domestic products and of those from other Members.⁵⁵

From a systemic point of view, the WTO judiciary brought under the definition of technical regulation of the TBT non-incorporated PPMs, that is, PPMs that are not observable on the product itself. This may be a welcome development, as the WTO judiciary would like to keep thorough judicial review of such measures for itself. From a legal point of view, it confounds the different categories of TBT measures and, arguably in a broader sense, the balance among the WTO agreements. Indeed, in that case, a more apposite and case-law consistent interpretation of the facts should have led the WTO judiciary to find that the TBT was not applicable and thus roll back to the application of Article III:4 GATT. However, one problematic feature of this option was that the Appellate Body would be unable to complete the analysis because the Panel exercised judicial economy with respect to the Mexican claims under the GATT, after finding that the TBT is *lex specialis* and after making findings under the latter agreement.

4. The TBT Code of Good Practice Relating to Standards

The structure of the TBT reveals a hierarchical relationship between the two types of instruments we discussed earlier. Whereas the obligations for technical regulations are in the main body of the TBT, the obligations regarding the development, adoption and application of standards are to be found in Annex 3 incorporating a Code of Good Practice (hereinafter ‘the Code’). This is in stark contrast with the previous, plurilateral Standards Code adopted in the Tokyo Round where rules for technical regulations and standards belonged to the main body of the agreement without differentiation between the two categories of measures. On substance, this does not make the provisions relating to standards any less binding, as the Annex is an integral

⁵³ See WTO 2012a, para. 239.

⁵⁴ WTO 2014, para. 5.22.

⁵⁵ See *Keck and Mithouard* (CJEU 1993), para. 16.

part of the TBT by virtue of Article 15.5 TBT. More importantly, the obligations under the Code relating to standards and Article 2 regarding technical regulations are for all practical purposes the same, thereby minimizing the importance of locating the obligations for the two main TBT instruments in two different places.

Having said this, it appears that the Code is not incorporated in the TBT but in a separate annex because the Code includes obligations that are mainly addressed to self-regulated and -governed national standard-setting bodies, whereby many of those bodies, as noted earlier, are private bodies composed of industry representatives. For this reason, the TBT foresees the possibility for the Code to be accepted by standardizing bodies, be it governmental or non-governmental; central, regional or local – established in the territory of any WTO Member. Indeed, the Code is open for acceptance and the ISO/IEC Information Centre keeps track of such acceptances.⁵⁶ As of February 2016, 174 standard-setting bodies from 128 WTO Members accepted the Code; among them there are 96 central government bodies, 67 non-governmental bodies, three statutory bodies, two parastatal bodies, three non-governmental regional bodies (the three European standard-setters, i.e. CEN, CENELEC and ETSI), one central hybrid body, one central governmental/local body and one autonomous body.⁵⁷ While the acceptance of the Code generates important signalling effects, Article 4 TBT provides that Members' obligations relating to compliance of domestic standard-setting bodies with the Code remain intact regardless of whether a domestic standard-setting body has accepted the Code.

Even if this serves consistency, some interpretive challenges remain. For instance, paragraph D of the Code requires that standardizing bodies accord equal treatment to foreign products when compared to other foreign or domestic products. Nevertheless, this obligation seems to be without content, for such bodies do not deal with products directly. Taking into account the work that typically SSOs deal with, it appears illogical to require from SSOs the type of non-discrimination that the TBT and WTO law in general requires from States. Rather, one would expect the Code to focus on fair and non-discriminatory access to standardization activities, participation, transparency, necessity and the like. For the sake of comparison and as an example of how non-discrimination could be phrased adequately, Article 5.5 of ISO/IEC Guide 59 of 1994 provides that standards shall neither be written nor adopted so as to discriminate among products on the basis of the place of origin.⁵⁸ Another example of this kind is to be found in Article 5.5.3 of the ISEAL Alliance Code of Good Practice which requires that membership criteria and application procedures in standard-setting organizations be transparent and non-discriminatory.⁵⁹

While not explicitly referring to the relationship between the TBT and ISO, the former has numerous references to the ISO, more particularly ISO/IEC Guide 2: 1991. The TBT provides that whenever terms that are included in this Guide are also mentioned in the TBT, then the meaning that these terms have according to the Guide becomes the authoritative one.⁶⁰ Thus, the ISO/IEC Guide 2:1991 constitutes important context for dispute settlement purposes by virtue of the Vienna Convention on the Law of Treaties (VCLT), directing the judiciary to have recourse to a non-WTO document to clarify certain TBT terms.⁶¹ Together with Article

⁵⁶ See Memorandum of Understanding on 'WTO Standards Information Service Operated by ISO'. Every standardization body that accepted the Code is obliged to prepare a biannual work program in which it provides information about the standards under preparation and the standards that it adopted in the preceding period.

⁵⁷ See TBT Committee 2016.

⁵⁸ See TBT Committee 1993.

⁵⁹ See ISEAL Alliance 2010.

⁶⁰ See WTO 1995, Annex 1, introductory paragraph.

⁶¹ Similar to the Harmonised System's explanatory notes. See, e.g., WTO 2008a, paras. 149ff.

1.1 TBT, they substantiate the attempt of the TBT drafters to position the agreement within the broader standardization community and to relate it to the existing international standard-setting processes in a positive manner. In addition, the Code reproduces principles and rules known from the ISO without however explicitly referring to it. For instance, paragraph G of the Code provides that national standard-setting bodies shall strive to be represented in international SSOs through one delegation to ensure coherence (national delegation principle).

5. Unfolding the conundrum of ‘relevant international standards’

The idea of favouring global convergence of technical regulations permeates the TBT.⁶² Article 2.4 requires that *relevant international standards* or *relevant parts* thereof (when they exist or are about to be adopted) be used as *a basis for* domestic technical regulations unless they are ineffective or inappropriate means for meeting the public policy objectives pursued. No grandfathering was allowed at the moment of adopting the agreement. In *EC – Sardines*, the Appellate Body confirmed that this obligation applies not only to technical regulations that were adopted after the entry into force of the WTO agreement, but also to technical regulations that already existed before the entry into force of the TBT but continued to produce effects.⁶³

Standards would be subject to a similar obligation. This means that a series of international standards that were adopted before the mid-90s and typically applied on a voluntary basis suddenly become mandatory reference points for domestic technical regulations. Thus, interest in international standard-setting activities as a gateway to influence the normative contents of the benchmarks potentially used in future WTO adjudication was also revived as a result.

In *EC – Sardines*, the concept ‘as a basis for’ was interpreted to mean that an international standard is used in this way when it is the principal constituent or fundamental principle for the purpose of enacting the technical regulation at stake, thereby revealing a very strong and close relationship between the two.⁶⁴ If only parts of a given international standard are used, then those that are relevant shall be used as a basis for the technical regulation at issue. At a minimum, the international standard and the regulation cannot contradict each other.

Finally, it bears noting that it is for the complaining party to prove that the international standard at issue is effective (capable of accomplishing the legitimate objective pursued) and appropriate (suitable for the fulfilment of the objective pursued) for the achievement of the objective pursued. In this analysis it would be for the judiciary to examine and determine the legitimacy of the objectives of the measure. Effectiveness focuses on the *results* of the means used, whereas appropriateness focused on the *nature* of the means used.⁶⁵ Adjudicating bodies may be more willing to deny such qualities to international standards, for instance, when perceptions and expectations of consumers are not satisfied by it⁶⁶ or when the technical regulation at issue sets higher standards (e.g. more detailed and accurate information) for consumer protection.⁶⁷

⁶² Other than standards, this is also obvious in the case of conformity assessment procedures. See, e.g., WTO 1995, Article 9.

⁶³ WTO 2002a, para. 205.

⁶⁴ *Id.*, paras. 244–45.

⁶⁵ *Id.*, para. 285.

⁶⁶ *Id.*, para. 289.

⁶⁷ See WTO 2011a, para. 7.734. This excerpt actually is one of the most striking ones in this Panel report. The Panel seems to examine indirectly, but still quite critically, the substantive content of the relevant international standard, leaving the window for the circumvention of international standards (a Codex standard in this case) wide open. In addition, the Panel appears to disregard the fact that one of the purposes of the Codex standard was indeed to protect

Pursuant to Article 2.5 TBT, a technical regulation is presumed to comply with the TBT and more specifically Article 2.2, if it is in accordance with *relevant international standards* and provided that is prepared, adopted or applied to protect national security; prevent deceptive practices; protect human and animal health or safety; or the environment. The rationale behind this ‘safe haven’ is that voluntary international standards ostensibly incorporate international preferences and unambiguous technical superiority. Furthermore, Article 2.9 provides for additional notification requirements in case relevant international standards are not used.

Thus, other than requiring Members to use relevant international standards in a positive manner and creating a rebuttable presumption of consistency as an extra ‘carrot’, the TBT imposes additional, burdensome conditions that Members need to comply with in case of neglecting international standards. In other words, in those areas where international standards exist, which, as noted earlier, are mainly of voluntary nature, they become the reference point and de facto mandatory normative technical material to be used by WTO Members. As a result, a mass of documents of at best uncertain legal normativity are transformed into international obligations equivalent to treaty text.⁶⁸

Article 2 TBT mentions various times the term ‘relevant international standard’ but lacks any provision that would offer a definition. This is in stark contrast to the importance of this exercise.⁶⁹ We mentioned earlier the TBT definition of a standard. The ISO/IEC Guide 2:2004, on the other hand, defines a standard as a

document, established by *consensus* and approved by a *recognized* body, that provides for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context.

Note: Standards should be based on the consolidated results of science technology and experience, and aimed at the promotion of optimum community benefits.⁷⁰ (emphasis added)

Furthermore, and quite tautologically, the Guide defines as international a standard that is adopted by an international standardizing/standards organization and made available to the public.⁷¹ Later on, the ISO/IEC Guide defines an international standardizing organization as the organization (that is, the body that is based in the membership of other bodies or individuals and has an *established constitution and its own administration*) whose membership is open to the relevant national body from every country.⁷² This seems to suggest that an international standard is not any different from a national standard in terms of *content*. Common and repeated use as well as fitness for purpose are important traits for both of them. What rather makes it distinct is the *nature* of the body preparing and adopting it, i.e. the *international* standardizing organization.⁷³

consumers from unduly confusing and detailed information. Thus, both the international standard and the domestic labelling scheme pursued the same legitimate objective. Why then opt for the domestic standard when the actual objective of the TBT is convergence and harmonization through the use of *international* standards? Interestingly, it would seem to suggest that the international standard may not have been ‘relevant’ in the first place. Unfortunately, the Panel’s findings in this respect were not appealed.

⁶⁸ See also Howse 2006, above n. 28, pg. 383.

⁶⁹ Cf. WTO 2015, para. 348.

⁷⁰ See ISO/IEC 2004, Art. 3.2.

⁷¹ Echoed in the EU Regulation 1025/2012, Art. 2(1)(a). Both documents avoid the question as to whether such documents should be made available to the public for free. The latter would go against the SSOs’ current business model whereby standards are documents for sale to interested parties and economic operators.

⁷² See ISO/IEC 2004, Art. 4.3.2., in conjunction with Art. 4.2.

⁷³ Compare the distinction between international, European and national standard in the EU Regulation 1025/2012, Article 2(1) (a), (b) and (d).

These definitions are important and relevant for the purposes of TBT interpretation, because the introductory paragraph of Annex 1 TBT provides that terms used in it that remain undefined in the TBT should have the same meaning as in the ISO/IEC Guide 2:1991.⁷⁴ Thus, in reconstructing the definition of a relevant *international* standard for TBT purposes, one would need to take elements from both the TBT definitions and the ISO/IEC Guide's definitions.⁷⁵

While not offering an explicit definition of what constitutes an international standard, the TBT definition of standard in Annex 1.2 TBT also deviates from the ISO definition in that it also considers as standards for TBT purposes those documents that are not based on consensus. This is a considerable deviation,⁷⁶ as the explanatory note in Annex 1.2 TBT is clear on the TBT drafters' awareness of the fact that international standards are typically based on consensus.

Thus, in *EC – Sardines*, the Panel first and the Appellate Body later rejected the EU's argument that only standards adopted by consensus can be regarded as relevant for purposes of Article 2.4 TBT. The EU, in this case, suggested that a standard such as the Codex Stan 94 which is accepted by only 18 countries, of which only four accepted it fully, cannot be regarded as an international standard.⁷⁷ Interestingly, in order to answer the EU's claim regarding the relevance of the Codex Alimentarius standard, i.e. an *international* standard, the Appellate Body had recourse to the generic definition of standard enshrined in the last two sentences of the explanatory note of Annex 1.2 TBT. This is an ambiguous interpretive technique to construct a definition by using elements from another definition and can be problematic: arguably, this has been the case here as well.

A careful reading of the explanatory note allows two different interpretations which seem to be equally plausible. The Panel and Appellate Body in *EC – Sardines* found that the word 'also' in the last sentence makes clear that the word 'document' in the same sentence can only refer to international standards. However, a reading leading to the opposite outcome is equally possible: the explanatory note serves the role of *concretizing* the generic term of standard enclosed in Annex 1.2 TBT and not international standards.

The note refers to the two general traits of standards: their voluntary character and the method of adopting them (consensus). However, even if the one before last sentence refers to the international standardization community, this does not change the fact that the Note is there to give flesh to the *generic* definition of standards for TBT purposes. In this respect, it is no coincidence that the Appellate Body was quite reluctant in *US – Tuna II* to revisit the analysis in *EC – Sardines*.⁷⁸

The interpretation suggested here would have an important repercussion: if the last two sentences of the explanatory note are to be read independently, then international standards *not* adopted by consensus would not benefit from the presumption of Article 2.5 TBT. Not only would such an interpretation be in consistency with the letter and spirit of the agreement; it would also, quite importantly, be an interpretation that fully respects and takes into account the peculiarities of the international standardization world.

⁷⁴ Note that the relevant definitions of the ISO/IEC Guide 2 : 1991 have remained identical in the ISO/IEC Guide 2: 2004.

⁷⁵ Recall that the TBT definition of standard prevails over the ISO one as per WTO (1995, Annex 1.2).

⁷⁶ Cf. WTO 2002b, para. 225.

⁷⁷ See *id.* at para. 4.33.

⁷⁸ Cf. WTO 2015, para. 353.

6. Recognized International Standardization Bodies

Even so, interpretive challenges remain. For instance, which bodies are ‘recognized standardization bodies’? Which among them constitute the ‘international standardization community’? The TBT refers to ‘relevant international standardizing bodies’ in the Code with particular ease, as if it was clearly defined and identified.⁷⁹

Contrary to the TBT, the SPS explicitly recognizes the international SSOs that should be deemed as relevant points of reference: the Codex Alimentarius Commission, the International Office of Epizootics (OIE); and the International Plant Protection Convention.⁸⁰ Even if the list is not exhaustive, it covers the most important international SSOs in the area of sanitary and phytosanitary issues. Importantly, all these bodies are intergovernmental organizations.

The TBT, in turn, does not have a similar provision, although one could plausibly argue that at least the ISO and IEC should be the first bodies to be regarded as having recognized activities in the area of technical standardization. A fundamental difference between the two areas of standardization is that technical standardization is in principle of private nature, organized within associations of bodies rather than intergovernmental organizations, as we explained earlier. Thus, any explicit reference to or incorporation of normative work done in an essentially private body would lie uncomfortably within an otherwise State-to-State international contract.⁸¹

The peculiar nature of technical standardization is also implicitly acknowledged in the TBT definition of standard. A TBT standard is typically adopted by a body, be it international, regional or central government one. In turn, the ISO/IEC Guide defines a body as a legal or administrative entity that has specific tasks and composition.⁸²

Obviously, the many references to the ISO would seem to suggest that this non-governmental federation of national standards bodies belongs to the international standardization community and thus its standards are international. The same would most likely apply to IEC. Yet, other international standard-setting bodies exist as well. The Annex 1.4 TBT, consistent with the WTO legacy, defines international bodies in an open-ended manner; international are those bodies or systems whose membership is open to the relevant bodies of all Members. This is largely in line with the ISO/IEC Guide definition of an international standardizing organization. Thus a regional body which is open to only some of the Members would not fall within this definition.

⁷⁹ WTO 1995, Annex 3, parass G and H.

⁸⁰ WTO 1994c, Annex A.3.

⁸¹ In *dicta*, the Appellate Body in WTO (2015) noted that, by not expressly referring to particular international SSOs, the TBT aims to encourage the development of international standards by bodies that were not already engaged in standardizing activities in the time of the entry into force of the TBT. This statement has a twofold meaning: first, it makes clear the Appellate Body’s willingness to be open to assessing the capacity of new international SSOs to create relevant international standards within the meaning of WTO (1995, Art. 2.4) and thus benefit from the presumption of TBT consistency, which arguably would increase their legitimacy within the international standardization community and the multilateral trading system. Second, the Appellate Body reminds us that such a recognition has a price, as it may be dependant on the standardizing body at issue showing that it meets the high due process criteria of the TBT Committee Decision (see *infra*). This is a responsibility *shared* by international SSOs and WTO Members participating therein. In acknowledging some ‘bite’ to an otherwise best-endeavour TBT provision relating to special and differential treatment (S&DT), the Appellate Body clarifies its intention in the future to make WTO Members accountable for their sincere efforts to ensure that international SSOs are organized and operated in a manner that ensures representative participation, taking the particularities of the developing countries into account. See WTO 2015, para. 379 and n. 745.

⁸² See also WTO 2011b, para. 7.679. To show the diversity of bodies that can come under this definition, the ISO/IEC Guide provides that a body can be, for instance, an organization, an authority, a company or even a foundation. Thus, organizations can also be bodies, but the definition of organization under the ISO/IEC Guide is narrow. See ISO/IEC 2004, Art. 4.2. This however is not always straightforward. For instance, in *US – Tuna II*, the Appellate Body seems to have misread this. See WTO 2015, para. 356.

If, however, membership to this body is not a priori excluded vis-à-vis a particular Member or its relevant standardizing body, then under certain circumstances its standards may still be regarded as international standards for TBT purposes.

For this to happen, the body would need to be a recognized one. This is reminiscent of Article 4.3 of the ISO/IEC Guide 2:2004 which defines as standardizing those bodies that have ‘recognized activities’ in standardization.⁸³ However, the Guide does not specify what recognized activities in standardization would mean and who should recognize such activities – and the same goes for the TBT. At the same time, the Guide does specify that standardization is the activity of establishing provisions for common and repeated use, aimed at the achievement of the optimum degree of order in a given context, more particularly the activity of preparing and implementing standards. It also makes clear that a recognized body in this area can be a body that, among other rules, also promulgates standards (standardizing body), but also a body whose main function is, pursuant to its statutes, the preparation, approval or adoption of standards that are publicly available (standards body).⁸⁴ The former category is broader and it is probably no coincidence that the Code uses this broad term to also cover bodies that incidentally develop standards.

However, with respect to ‘recognition’, neither the Guide nor the TBT establish a quantitative benchmark. For instance, can a Member invoke as a defence against a standard that, for instance, its relevant body did not participate in the standardization activities of a given body or that, even if it participated, it objected or voted against that standard? Taking into account that consensus does not imply unanimity in the international standardization community, a critical mass of negative votes would be needed to raise doubts against the international character of a standard adopted within this setting.

In *US – Tuna II*, the Appellate Body dealt with the meaning of ‘recognition’. It first found that recognition implies that Members know, or at least expect that the international body at stake is active in standardization. Furthermore, recognition would be an issue to examine on a case-by-case basis, examining evidence of recognition by Members and/or standardizing bodies at the regional, national or sub-national level. Thus, the Appellate Body avoided establishing a general test which would imply a *de minimis* rule for recognition, other than noting that ‘the larger the number of countries that participate in the development of a standard, the more likely it can be said that the respective body’s activities in standardization are “recognized”’.⁸⁵

Thus, it was made clear that recognition by WTO Members, rather than the standardization community (its ‘peers’) would cover a broad part of the scope of recognition within the meaning of Annex 1.2 TBT. However, bodies having developed a single standard would not come outside the scope of the TBT, simply due to the fact that they do not have extensive standardization activities. Elements such as wide participation of WTO Members in the development of the standard; wide recognition of the validity and legality of the single standard; or adherence to the TBT Committee Decision of 2000 on principles for the development of international standards (the ‘TBT Committee Decision’)⁸⁶ would reveal a body with recognized activities in standardization.⁸⁷

⁸³ In *US – Tuna II*, the Appellate Body found that the ISO definition of a standardizing body should assist in the interpretation of the TBT term ‘recognized body’. See WTO 2015.

⁸⁴ ISO/IEC 2004, Arts. 4.3 and 4.4.

⁸⁵ WTO 2015, para. 390.

⁸⁶ See TBT Committee 2000, para. 20 and Annex 4.

⁸⁷ See WTO 2015, para. 394.

In this respect, an important argument was brought forward by Canada: Canada suggested that a recognition of activities of an international standardizing body cannot be assessed independently of the TBT Committee Decision of 2000 on principles for the development of international standards (the ‘TBT Committee Decision’).⁸⁸ Put differently, an international standardizing body is ‘recognized’ if it develops standards or engages in standardizing activities in accordance with certain recognized principles such as those developed in the TBT Committee Decision. The Appellate Body correctly agreed that evidence about adherence to the TBT Committee Decision would be relevant for determining whether the body at issue has recognized activities.⁸⁹ It is to the TBT Committee Decision that we now turn.

7. *The TBT Committee Decision*

Article 2.4 TBT appears to endorse international standards and international SSOs without any meaningful qualifications or conditions. It essentially transforms voluntary standards into de facto mandatory norms. This raises concerns regarding the way that such international standards are set and whether they indeed reveal international preferences and absolute technical superiority. Practice suggests that various standards fail to achieve this. In several instances, international standards were adopted with a narrow majority of the absolute number of votes and despite conflicting scientific opinions.

Take for instance the case of *EC – Sardines*, as noted previously, where a small minority of Codex Members adopted the relevant Codex standard (18 out over 150 at the time). The same goes in the case of *EC – Hormones*. The GMO standard is of course an SPS standard, but it is indicative of the concerns that international standardization may raise: the relevant Codex standard was adopted with a very narrow majority of 33 votes to 29 with 7 abstentions. Indeed the TBT Agreement, as interpreted by the WTO adjudicating bodies, endorses standards adopted by international SSBs without examining their representativeness, comprehensiveness, or process of adoption. Can standards of this type be accepted as ‘international’ without running counter to any conceivable notion of fairness?

In 2000, the TBT Committee, which is responsible for the implementation of the TBT, adopted a decision during the TBT Second Triennial Review incorporating six principles and procedures that should be observed during the development of international standards. It was generally felt more input from a wider set of interests was needed in the international standardization community. According to the dominant view, bodies operating with open, impartial and transparent procedures that afforded a fair opportunity for consensus among interested parties in all WTO Members would most likely prepare effective and relevant standards.⁹⁰ Clearly the TBT Committee Decision constituted a broader observation by WTO Members that rules and procedures within international SSOs needed to improve and strengthen. Clearly, it was an external call for reform of the international standardization community practices.⁹¹

The principles identified in the TBT Committee decision are: transparency; openness; impartiality and consensus; effectiveness and relevance; coherence; and addressing the concerns of developing countries. In *EC – Sardines*, the EU alleged that the Codex

⁸⁸ See TBT Committee 2000, para. 20 and Annex 4.

⁸⁹ See WTO 2015, para. 376.

⁹⁰ See TBT Committee 2001, p. 12.

⁹¹ Cf. WTO 2015, para. 371 and n. 736.

Alimentarius standard at issue was not a ‘relevant international standard’ because it was not adopted by consensus and thus was inconsistent with the principle of relevance laid down in this Decision. The Panel disagreed and stated that this Decision was not binding, but merely a ‘policy statement of preference’, confirming the WTO adjudicators’ unwillingness to examine with a critical eye the standards development process. The findings remained unappealed for several years.

However, in the recent *US – Tuna II* decision, the Appellate Body found that the TBT Committee Decision constitutes a ‘subsequent agreement’ within the meaning of Article 31(3) (a) VCLT and thus should be read together with the TBT when interpreting standards-related TBT provisions.⁹² The Appellate Body was led to this conclusion based on various elements such as the fact that it was adopted by consensus; it bears specifically upon the interpretation and application of a TBT provision; and Members’ expressed intention to: (a) develop a better understanding of international standards within the TBT; (b) ensure the effective application of the TBT; and (c) clarify and strengthen the concept of international standards.⁹³

Indeed, agreements subsequent to the conclusion of a previous agreement aiming to specify how existing rules or obligations are to be applied (rather than to create new or extend existing obligations) can fall under Article 31(3)(a) VCLT, constituting a further authentic element of interpretation to be taken into account along with context.⁹⁴ However, considering the TBT Committee Decision as ‘subsequent agreement’ barely squares with the *EC – Sardines* previous finding that the last sentence of the Explanatory Note in Annex 1.2 TBT also relates to international standards. Quite crucially, if consensus should not be required for a standard to be regarded as a ‘relevant international standard’, then the TBT Committee Decision, by requiring consensus, amounts to an *amendment* of the TBT text.⁹⁵

After juxtaposing the Committee Decision principles to the standard that the Panel found to be a ‘relevant international standard’ within the meaning of the TBT, the Appellate Body reversed the Panel’s finding because the standard-setting body at issue was not open to at least all Members, as participation was possible by invitation only. In a clear message towards international SSOs, the Appellate Body found that standardization bodies must be open and

⁹² VCLT 1969, Art. 31 (*General rule of interpretation*) provides:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) *any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions*; (emphasis added)

⁹³ WTO 2015, paras 371–72.

⁹⁴ Cf. WTO 2008b, para. 391; and WTO 2012b, para. 265.

⁹⁵ Interestingly, this goes against the letter and spirit of the WTO treaty. We find contextual support in WTO (1994b, Article IX.2) prohibiting the abuse of the provision relating to authoritative interpretation to undermine the amendment provisions in WTO (1994b, Article X). Cf. WTO 2008b, para. 383. By the same token, Decisions by WTO organs (such as the TBT Committee) cannot be used to circumvent the amendment provisions of the WTO. We believe that this is yet another indication that decoupling the last two sentences of the Explanatory Note so that its last sentence only refers to domestic and regional standard is the only reasonable interpretation of this provision.

transparent at every stage of standards development, thereby demonstrating the potential ‘bite’ of the WTO as an *ex post* arbiter of the legitimacy of standards.⁹⁶

Tuna II should be assessed within its specific context: it was confined to a discussion of practices and institutional structures of a *regional* standardizing body, whereas it discussed shortly only one out of the six principles identified in the TBT Committee Decision. Even so, *Tuna II* marks a shift from previous rulings where international standards were endorsed without examining under which procedural and substantive safeguards international SSOs had elaborated them. It demonstrates the WTO’s incipient determination to delve into the very essence of the international standardization processes.

Nevertheless, it is argued that the principles set out in the TBT Committee decision are not sufficiently inclusive. From a normative point of view, for a standard to be regarded as a genuinely international standard, additional, but at the same time more concrete criteria may need to be developed to reflect concerns about adequate levels of participation, transparency, coherence and relevance. In this respect, a new and more comprehensive conceptual framework could be developed to assess the international character of international standards.⁹⁷ This new framework could be inspired from more recent work on good regulatory practices (including transparency, participation, deliberation, impact assessment and periodic review), development and sustainability. At the same time, however, any additional requirements or interference with the technical standardization world, notably when safety concerns may not be that apparent, would have to be fair and balanced so that dynamic efficiency gains and innovation incentives continue to be in place to make sure that fair and non-discriminatory returns exist which allow for the innovation spiral to continue apace.

CONCLUSION

With its presumption of consistency when relevant international standards are used as a basis for domestic regulations, the TBT shows undue deference to the international standardization regimes. WTO cases where standards were used to defeat national regulatory autonomy have led to serious questions about the legitimacy of these regimes and their standards. By initially applying narrowly the TBT and the ensuing TBT Committee Decision, the WTO adjudicating bodies have legitimized certain standards which do not reflect a critical mass of international preferences and thus should not be used as reference points or benchmarks because of certain deficiencies identified in the process of their adoption.

In what preceded, we showed that the erosion of State consent in international law and the transfer of power to technocrats can sometimes lead to absurd results which are in dire need of being mapped and addressed. International standard-setting is emblematic of such challenges. Anecdotal evidence suggests that international standard-setters often behave as a *de facto* intractable club, excluding voices which increasingly seek to be heard in such fora. There are examples demonstrating the political imbalances that create distortions and elitist standards. However, demands for more openness and representativeness that come from emerging economies and other developing countries suggest that the current formation of regulatory-making in this arena reflects anachronistic international geopolitics and can no longer hold. Power is now more equally distributed among the nations of the world. Such redistribution has to be reflected

⁹⁶ See WTO 2015, para. 382.

⁹⁷ See also “Relevant International Standards” and “Recognized Standardization Bodies” under the TBT Agreement’ in Delimatsis 2015.

within international organizations as well, notably those that may have substantial effects on the economic emancipation and welfare of a given country. At the same time, investment in R&D and innovation is a prerequisite if less advanced players want to benefit from reformed standard-setting processes. To be sure, important IP-related issues would need to be part of the equation that strives to bring more equality in the ecology of international technical standardization.

US – Tuna II can herald a new era of more transparent and open international standard-setting. The jurisprudential shift towards more critical thinking about the activities of the international standardization community certainly affects international SSOs such as the International Organization for Standardization (ISO) or the Codex Alimentarius Commission (CAC), which are interested in remaining relevant for the trade regulation regime. Additionally, their reputation may suffer if their standard-setting practices are found to lack legitimacy.

More empirical research is needed to develop analytical tools and heuristic devices which would objectively assess the mechanics of international standard-setting and, if needed, make the case for institutional reform within international SSOs with a view to increasing deliberation, representativeness, openness, transparency, due process and accountability without jeopardizing economic progress and technological innovation. This possibility is not merely theoretical: arguably, the interpretation of the COOL Panel as to when a standard constitutes an effective and appropriate means for achieving a legitimate objective may indeed go in that direction – a lock, stock and barrel interpretation of the message conveyed by the Appellate Body in *US – Tuna II*.